IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-~~76~~-304

ELWIN B. BURNS,

Petitioner,

vs.

EAST BATON ROUGE PARISH SCHOOL BOARD and ROBERT AERTKER,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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August 31, 1976

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Pursuant to Rule 23 of the Supreme Court of the United States, Elwin B. Burns files this petition for certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the District Court dismissing petitioner's 1973 lawsuit is unreported and is set out in Appendix A to this petition. The minute entry of the District Court dismissing petitioner's 1975 lawsuit is unreported and is set out in Appendix B to this petition. The opinion of the Court of Appeals affirming the dismissal is reported at 530 F.2d 1201 and is set out in Appendix C. The Order of the Court of Appeals denying petitioner's petition for rehearing is reported at 533 F.2d 1135 and is set out in Appendix D.

QUESTION PRESENTED

Whether the dismissal of petitioner's 1973 lawsuit under 42 U.S.C. §1981 for failure to state a claim for relief barred his 1975 lawsuit under Title VII of the Civil Rights Act of 1964 when both lawsuits attacked the allegedly racially discriminatory firing of petitioner by respondents in 1972.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The order of the United States Court of Appeals for the Fifth Circuit affirming the dismissal of petitioner's complaint was entered on April 29, 1976. See Appendix C. Petitioner timely filed a Petition for Rehearing and Suggestion for Hearing or Rehearing En Banc on May 6, 1976. The Court of Appeals denied the Petition on June 2, 1976. See Appendix D. This petition is being filed less than 90 days from the entry of the Order denying rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. §1981: Equal rights under the law.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

R.S. §1977.

42 U.S.C. §2000e-5(f)(3):

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. Such an action may be brought in any judicial

district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

STATEMENT OF THE CASE

This claim for individual relief under Title VII of the Civil Rights Act of 1964 was filed by Elwin B. Burns on June 30, 1975 in the United States District Court for Middle Louisiana. Mr. Burns alleged that he was terminated as a teacher because of his race on May 31, 1972.

At the time the complaint was filed, Mr. Burns had not received a notification of the right to sue under Title VII, but upon his subsequent receipt of the notice, the District Court allowed the complaint to be supplemented.

Named as defendants were the East Baton Rouge Parish School Board (the Board) and Mr. Robert Aertker, the Superintendent of East Baton Rouge Parish Schools (the Superintendent). Mr. Burns requested injunctive and declaratory relief, back pay and punitive damages from the Board and the Superintendent.

The Board and the Superintendent moved to dismiss the complaint on grounds that the action was barred by res judicata. Mr. Burns had filed

a lawsuit in the same court on June 8, 1973 attacking his termination, which had been dismissed for failure to state a claim. Burns v. East Baton Rouge Parish School Board, Civ.No. 73-181 (M.D.La.). That case had been appealed to the Court of Appeals for the Fifth Circuit, which dismissed the appeal because it was filed out of time. Burns v. East Baton Rouge Parish School Board, No. 75-1581 (5th Cir.Mar.24, 1975).

On September 3, 1975, the District Court dismissed the suit as res judicata, and appeal was timely noticed to the Court of Appeals on September 29, 1975. The Court of Appeals affirmed the dismissal on April 29, 1976. 530 F.2d 1201. After a timely petition for rehearing and suggestion for hearing or rehearing en banc was filed on May 6, 1976, the Court of Appeals denied rehearing on June 2, 1976. 533 F.2d 1135.

REASONS FOR GRANTING THE WRIT

1. The decision below affectively denies petitioner his day in court.

Petitioner first sought to redress his allegedly discriminatory firing when he filed suit in the District Court in 1973 under the Civil Rights Act of 1866, 42 U.S.C. §1981. In its Minute Entry dismissing the lawsuit, the District Court referred to a state court action filed by petitioner based upon the same claim for relief, and stated that petitioner "may, also, raise constitutional questions in that suit if he wishes." See Appendix A. But when petitioner filed a second lawsuit in federal court attacking his termination but based upon Title VII, the same District judge dismissed the case on grounds of res judicata. Petitioner now has no remedy left because of the harsh and inflexible imposition of the res judicata rule.

2. The second lawsuit seeks different remedies and proceeds under a different theory than the first one.

This court has recently reaffirmed the difference, from a remedial and substantive point of view, of 42 U.S.C. §1981 and 1983, and Title VII. Washington v. Davis; 44 U.S.L.W. 4789 (June 7, 1976). In an action brought under §1981, the standards developed under Title VII could not be used to invalidate a written personnel test, absent proof of discriminatory intent. The year before, this court took pains to distinguish §§1981 and 1983 from Title VII in Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 457-460 (1975), and concluded that §1981 did not bring in its van Title VII's panoply of substantive aids and remedial devices: "investigation, conciliation, counsel, waiver of court costs, and attorneys fees, items that are unavailable at least under the specific terms of 1981." 421 U.S. at 460.

Petitioner's first lawsuit was a §1981 action, not a Title VII one. Because he had not statutorily exhausted for purposes of Title VII until 1975, after he had filed his second lawsuit, these were issues which survived the 1973 dismissal. These issues were not actually litigated, and as a consequence, could again be raised. Moreover, since the 1973 case went off on a motion to dismiss, it is quite clear that no factual issues were passed upon, and hence petitioner should have been able to raise these in another proceeding. Restatement of Judgments § 68(2)(1942) states as follows:

> A judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of fact not actually litigated and determined in the first action.

See, e.g., Tutt v. Doby, 459 F.2d 1195 (D.C.Cir. 1972); Schmucker v. Nationwide Mutual Insurance Co., 344 F.Supp.701 (E.D.Pa.1972); Colditz v. Eastern Airlines, Inc., 329 F.Supp.691 (S.D.N.Y. 1971); Brandkamp v. Chapin, 473 S.W.2d 786 (Mo. App.1971).

3. This case raises important questions of federal procedural law.

Since this court's first, and still definitive, decision on res judicata, Cromwell v. County of SAC, 94 U.S.351 (1876), there have been a plethora of decisions applying the doctrine. In its most recent statement on the question, this court held that if there has been a full and fair litigation of a claim, then a litigant cannot again raise the issue in a subsequent proceeding. Stone v. Powell, 44 U.S.L.W. 5313, 5320-21 (July 6, 1976). That case applied the rule to a federal habeas corpus proceeding under 28 U.S.C. §2254 involving a prisoner in state custody. But it is certainly controlling here. Cf. N.L.R.B. v. Denver Building and Construction Trades Council, 341 U.S. 675, 682-683(1951). Elwin Burns has never been given an opportunity to fully and fairly litigate his claim of unlawful discharge. His case has twice been dismissed by the District Court without any consideration of the merits of his claim, and twice this dismissal has been affirmed by the Court of Appeals. He has yet to have his day in court.

Moreover, by equating petitioner's claim for relief under Title VII with his claim for relief under s1981, the decision of the Court of Appeals is in conflict with the holdings of this court in Washington v. Davis, supra and Johnson v. Railway Express Agency, Inc.

CONCLUSION

For the above and foregoing reasons, petitioner respectfully requests that his petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit be granted.

Respectfully submitted,

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August 31, 1976

[APPENDIX A]

ELWIN B. BURNS

OCTOBER 4, 1973

V.

UNITED STATES
DISTRICT COURT

MIDDLE DISTRICT OF
LOUISIANA

Civ. Action
No. 73-181

EAST BATON ROUGE PARISH
SCHOOL BOARD, ET AL

This matter is before the Court on motion by the defendant, East Baton Rouge Parish School Board, to dismiss this case. No oral argument is required.

There is no question but that the procedures followed by the School Board in this case, as evidenced by the record itself, were above reproach and in compliance with state law. The plaintiff was a non-tenured teacher and as such could be dismissed upon the written recommendation of the Superintendent of Schools accompanied by valid reasons therefor. La. R.S. 17:442. As a non-tenured teacher, he was not entitled to a hearing on his dismissal unless there was evidence that he was dismissed for purely racial reasons. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S.Ct. 2701 (1972). Also, there were no charges made against this plaintiff which might in any way damage his community standing, and certainly there was no stigma imposed upon him that foreclosed his freedom to take advantage of other employment opportunities. See Roth, supra, at p. 2707.

The School Board in this case, while not required to do so, did grant the plaintiff a hearing at which hearing the plaintiff and his attorney were present. While La. R.S. 17:443 speak only in terms of permanent, or tenured teachers, when it gives a discharged teacher the right to petition a court of competent jurisdiction for a full hearing to review the action taken by the School Board, nevertheless, this plaintiff has availed himself of that section and has filed suit in Louisiana's Nineteenth Judicial District Court. That suit is presently pending on the docket of the State Court. If there was a violation of the plaintiff's contract of employment, or if there was some violation of state law, the plaintiff's remedy is through his state court suit and not by an action brought before this Court. The record itself belies plaintiff's suggestion that he was discharged because of his race. It is about time that the United States District Courts be relieved of reviewing every instance of discharge of a teacher in the many schools under its jurisdiction. These are matters between the School Board and the teacher which should be resolved in the state courts if there is any violation of contractual rights involved. Louisiana law gives this plaintiff all of the relief which he needs or to which he is entitled. He has been discharged by what appears to be valid action on behalf of the school board. He was given a hearing at which his attorney was present. He now has a suit pending in the State Court attaching his discharge as a violation of state law. He may, also, raise constitutional questions in that suit if he wishes. Under the circumstances of this case, this complaint simply does not raise a question upon which relief could be granted by this Court, and therefore:

IT IS ORDERED that the motion of the defendant, East Baton Rouge Parish School Board, to dismiss this case be, and it is hereby GRANTED.

[APPENDIX B]

ELWIN B. BURNS

SEPTEMBER 3, 1975

v.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

Civ. Action No. 75-224

EAST BATON ROUGE PARISH SCHOOL BOARD, ET AL

This matter is before the Court on motion of the defendants to dismiss plaintiff's complaint as being res judicata. After due consideration of the record in this case, and after due consideration being given the memoranda filed by counsel for both parties in connection with this motion:

IT IS ORDERED that defendants' motion to dismiss this suit as "res judicata" be, and it is hereby GRANTED, and this suit is hereby DISMISSED.

[APPENDIX C]

Elwin B. BURNS, Plaintiff-Appellant,

v.

EAST BATON ROUGE PARISH SCHOOL BOARD and Robert Aertker, Individually and in his capacity as Superintendent of East Baton Rouge Parish Schools, Defendants-Appellees.

No. 75-3849
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

April 29, 1976.

PER CURIAM:

In this 1975 nontenured Black teacher's suit claiming racial discrimination in his discharge, the District Court held that it was barred by res judicata by reason of his 1973 suit in the same Court. Whether the 1975 suit should be characterized as the "same cause of action" as the rubric goes, *see Commissioner of Internal Revenue* v. *Sunnen*, 1948, 333 U.S. 591, 597, 68 S.Ct. 715, 719, 92 L.Ed. 898, 905; *Cromwell* v. *County of Sac*, 1877, 94 U.S. 351, 352, 24 L.Ed. 195, 197; *Dove* v. *Kleppe*, 5 Cir., 1975, 522 F.2d 1369, 1374; *Stevenson* v. *International Paper Co.*, 5 Cir., 1975, 516 F.2d 103, 109-10, it is plain from the examination of both 1973 and 1975 complaints and the District Court's minute entry memoranda that at the heart of each was the basic decisive charge of racial discrimination. *See Acree* v. *Air Line Pilots Association*, 5 Cir., 1968, 390 F.2d 199, 201, *cert. denied*, 392 U.S. 852, 89 S.Ct. 88, 21 L.Ed.2d 122. It is equally plain that the Judge, in dismissing the 1973 suit on its merits, categorically rejected this claim. So if it is not barred by res judicata it surely is by collateral estoppel.

AFFIRMED.

[APPENDIX D]

UNITED STATES COURT OF APPEALS

Fifth Circuit

DENIALS OF REHEARING EN BANC

(Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12)

Group 1—Denials where no member of the panel nor Judge in regular active service on the Court requested that the Court be polled on rehearing en banc.

Group 2—Denials after a poll requested by a member of the panel or a Circuit Judge in regular active service.

Group 3—Denials on the Court's own motion after a poll requested by a member of the panel or a Circuit Judge in regular active service.

Title	Docket Number	Date of Denial	Citation of Panel Decision
GROUP 1			
Adcox v. Caddo Parish School Board	74-4153	6/ 1/76	W.D.La., 530 F.2d 973
Bourgeois v. Seafarers' Pension Plan	75-1049	6/ 1/76	E.D.La., 530 F.2d 973
Burns v. East Baton Rouge Parish School Board	75-3849	6/ 2/76	M.D.La., 530 F.2d 1201
Ricketts v. State of Texas	75-3663	6/ 1/76	W.D.Tex., 530 F.2d 974
Ricketts v. U. S.	75-3669	6/ 1/76	W.D.Tex., 530 F.2d 974
U. S. v. Braddy	75-3766	6/ 1/76	S.D.Ga., 531 F.2d 573
U. S. v. Griffin	75-3625	6/ 1/76	M.D.Ga., 530 F.2d 101
U. S. v. Houltin	74-4144	6/ 1/76	W.D.Tex., 525 F.2d 943
U. S. v. Texas Education Agency (Austin Independent School District)	73-3301	6/ 9/76	W.D.Tex., 532 F.2d 380
Williams v. Usery	75-3458	6/ 8/76	S.D.Fla., 531 F.2d 305
GROUP 3			
Covington v. Cole	75-1660	6/ 1/76	E.D.Tex., 528 F.2d 1365

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